Supreme Court, U.S.
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In The

Supreme Court of the United States

LAMAR WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit panel misinterpreted *Santos v. United States*, 553 U.S. 507 (2008) by creating a categorical exclusion for drug cases conflicting with the rule of *Clark v. Martinez*, 543 U.S. 371 (2005).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
(A) Statement of Facts	4
(B) Proceedings in the Ninth Circuit	6
(C) The Ninth Circuit's Decision in *Webster*	7
REASONS FOR GRANTING THE WRIT	9
I. CONFLICTING VIEWS OF THE PRECEDENTIAL VALUE OF *SANTOS* HAVE LED TO CONFLICTING INTERPRETATIONS OF THE MONEY LAUNDERING STATUTE	9
(A) The Court's Decision in *Santos*	9
(B) The Circuits are Split as to the Effect of *Santos* in Predicate Crimes Other Than Gambling	11
II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS	13
III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE	19
CONCLUSION	21

TABLE OF CONTENTS – Continued

Page

APPENDIX A

United States Court of Appeals for the Ninth Circuit Opinion filed September 30, 2010 ..... App. 1

APPENDIX B

Order Denying Petition for Rehearing and Rehearing En Banc filed December 6, 2010 ..... App. 16

TABLE OF AUTHORITIES

Page

CASES

Bifulco v. United States, 447 U.S. 381 (1980) 18

Clark v. Martinez, 543 U.S. 371 (2005) ..... *passim*

Combs v. United States, 129 S.Ct. 2812 (2009) 11

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) 11

United States v. Bueno, 585 F.3d 847 (5th Cir. 2009) 10, 13

United States v. Demarest, 570 F.3d 1232 (11th Cir. 2009) 12

United States v. Estate of Donnelly, 397 U.S. 286 (1970) 20

United States v. Hodge, 558 F.3d 630 (7th Cir. 2009) 12

United States v. Kratt, 579 F.3d 558 (6th Cir. 2009) 12, 20

United States v. Lee, 558 F.3d 638 (7th Cir. 2009) 12

United States v. Moreland, 604 F.3d 1058 (9th Cir. 2010) 6

United States v. Moreland, 622 F.3d 1147 (9th Cir. 2010) 6

United States v. Santos, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) ..... *passim*

United States v. Spencer, 592 F.3d 866 (8th Cir. 2010) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Van Alstyne, 584 F.3d 803 (9th Cir. 2009) 11, 12

United States v. Webster, 623 F.3d 901 (9th Cir. 2010) ..... *passim*

United States v. Yusuf, 536 F.3d 178 (3d Cir. 2009) 11, 12

Watson v. Comm'r, 345 U.S. 544 (1953) 20

Zadvydas v. Davis, 533 U.S. 678 (2001) 14

STATUTES

United States Code

8 U.S.C. § 1231(a)(6) 14

18 U.S.C. § 2 5

18 U.S.C. § 1956(a)(1)(A)(i) 1, 5, 9

18 U.S.C. § 1956(h) 5

21 U.S.C. § 841(a)(1) 5

21 U.S.C. § 846 5

21 U.S.C. § 851 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

RULES

F.R.A.P. 28(j) 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Evan Ennis, *An Uncertain Precedent: United States v. Santos and the Possibility of a Legislative Remedy*, 95 Cornell L. Rev. 191 (2009) 11

U.S. Sentencing Commission, Datafile, Fiscal 2009 20

OPINION BELOW

The Ninth Circuit Court of Appeals selected its opinion for publication in the Federal Reporter. The decision is reported at 623 F.3d 901 and is reprinted in the Appendix at 1-15.

JURISDICTION

The judgment appealed from is a final criminal sentence. The appellate court had jurisdiction over the final judgment of the District Court under 28 U.S.C. § 1291. The Ninth Circuit filed its decision on September 30, 2010 (App. A), and entered an order denying petitioner's motion for rehearing and rehearing *en banc* on December 6, 2010 (App. B). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit Court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

The text of the relevant statute, 18 U.S.C. § 1956(a)(1)(A)(i) (2006) is set forth below:

Laundering of monetary instruments

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity . . .

INTRODUCTION

This petition asks the Court to answer a question that has confounded the lower courts in the wake of *United States v. Santos,* 553 U.S. 507 (2008). The plurality opinion in *Santos* held that the term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956(a)(1), is ambiguous and that, under the rule of lenity, the term means "profits" rather than "receipts." *Santos* was a gambling case, and the circuits are irreconcilably split when applying the statute to other predicate offenses, such as the drug trafficking allegation in this case.

This Court should grant certiorari to resolve the conflict in circuits over the interpretation of the money laundering statute in cases involving factual circumstances other than the gambling scenario involved in *Santos*.

Furthermore, this Court should also grant certiorari because the Ninth Circuit and other circuit courts have contravened the precedent established by this Court in failing to recognize that an ambiguous term in a criminal statute must be interpreted uniformly in the defendant's favor, regardless of the factual circumstances of a particular case. *See Clark v. Martinez*, 543 U.S. 371 (2005). The Ninth Circuit erred in its interpretation of *Santos* by creating a

categorical exclusion for drug cases conflicting with the rule of *Clark*.

In *Clark v. Martinez*, 543 U.S. 371, 386 (2005), the Court declined to "establish within our jurisprudence * * * the dangerous principle that judges can give the same statutory text different meanings in different cases." Yet the lower courts have implemented this same "dangerous principle" by interpreting § 1956(a)(1) differently depending on the factual context. Consistent with *Clark*, seven Justices joined opinions in *Santos* that concluded that the statute's meaning could not change depending on the facts of a case. *See* 128 S.Ct. at 2031 (plurality); *id.* at 2036 (Alito, J., dissenting). Given that the Court has now held that the ambiguous term "proceeds" means profits in one factual context, that same term must be interpreted consistently in other cases, whether under the rule in *Clark* or the rule of lenity that was the basis for the holding in *Santos*.

This question is dispositive of the instant case because there is no proof that the funds at issue constituted profits of unlawful activity, and because Webster's conviction, of the drug possession and conspiracy counts, was based on a *Pinkerton* theory arising out of the money laundering conspiracy. *United States v. Webster*, 623 F.3d at 901, 907 (9th Cir. 2010).

Furthermore, this issue, as the government itself conceded in *Santos*, is of "[r]ecurring [i]mportance." Pet. for Cert. 26, *United States v. Santos*, No. 06-1005.

Despite the fact that the statute has been amended for future prosecutions, potentially hundreds or thousands of pre-amendment defendants will raise this issue on direct appeal or on collateral review.

Thus, some defendants similarly situated with Lamar Webster will go free while others, like Webster, will languish in prison depending solely on where they happened to be prosecuted. The Court should grant certiorari to prevent this injustice.

STATEMENT OF THE CASE

(A) Statement of Facts

In December of 2004, Undercover Officer Mike Gilluly, of the Billings Police Department, had an informant make several controlled buys of methamphetamine from one Richard Todd, who was arrested along with four of his confederates. Facing long prison sentences, all defendants pled guilty and agreed to cooperate to attempt to reduce their sentences. *Webster*, 623 F.3d at 903. (App. 2).

Todd and others named Lamar Webster, who has continually protested his innocence, as their source of supply. They claimed that Webster sold the methamphetamine to them in California, while various members of the Todd crime family transported the drugs to Billings, where it was stored in stash houses for resale.

The Government's proof against Webster of an alleged "historical" (i.e. no drugs) conspiracy to possess methamphetamine and wire money from the proceeds consisted solely of co-conspirator testimony and one $300 Western Union wire. No drugs, money, receipts, telephone records, or other physical evidence connected to Webster was introduced at trial. The Government argued that the $300 wire and resulting wire transfer conspiracy were used to fuel the transport of methamphetamine to Montana from California. Significantly, Webster was not charged with sale of drugs or conspiracy to sell drugs in the District of Montana.

Money laundering was established at trial solely upon receipt of the $300 wire. Promotion money laundering conspiracy was used to prove the drug counts on a *Pinkerton* theory. No instruction was given by the trial judge defining "proceeds" as "profits."

Lamar Webster was convicted of (1) conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, (2) possession with intent to distribute over 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, (3) money laundering conspiracy, 18 U.S.C. §§ 2, 1956(h), and (4) money laundering, 18 U.S.C. § 1956(a)(1)(A)(i). Since the Government filed a notice pursuant to 21 U.S.C. § 851, Webster was sentenced to a mandatory term of life without parole.

(B) Proceedings in the Ninth Circuit

After the Ninth Circuit published its initial decision in *United States v. Moreland*, 604 F.3d 1058 (May 3, 2010) (discussing and applying *United States v. Santos*, 553 U.S. 507 (2008)), and before oral argument on June 9, 2010, the Government filed a letter pursuant to F.R.A.P. 28(j), Webster argued orally before the panel that the decision in that opinion compelled the conclusion that the failure to define "proceeds" as "profits" constitutes plain error.

Moreland came to the Ninth Circuit on remand from this Court, ___ U.S. ___, 129 S.Ct. 997, 173 L.Ed.2d 289, in light of this Court's decision in *Santos*. The case involved mail fraud, wire fraud, money laundering, and conspiracy to commit the same in connection with a pyramid scheme. The Circuit Court held that the failure to instruct the jury that "proceeds" were defined as "profits" required reversal. 604 F.3d at 1077. The promotion money laundering counts at issue in *Moreland* corresponded to "wire transfers for the purpose of paying commissions." *Id.* Reasoning that those payments "raise the same merger problem condemned in *Santos*" the panel held that the jury instructions should have defined proceeds as profits. *Id.*

Thereafter, on September 17, 2010, the Ninth Circuit withdrew and superseded the opinion by *United States v. Moreland,* 622 F.3d 1147. However, the second opinion in *Moreland* does not alter the ruling on proceeds versus profits.

(C) The Ninth Circuit's Decision in *Webster*

The *Webster* Panel disagreed with Webster's argument, carving out an exception from the rule pronounced in *Santos* for drug cases:

> We, therefore, read *Santos* as holding that where, as here, a money laundering count is based on transfers among co-conspirators of money from the sale of drugs, "proceeds" includes all "receipts" from such sales. *See Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1034 (9th Cir. 2009) (explaining that, when the Supreme Court issues "no majority opinion and the plurality takes a legal position more far-reaching than the position of a concurring [J]ustice or [J]ustices[,] . . . the narrowest view that commands a majority of [J]ustices is the law" (citing *Marks v. United States*, 430 U.S. 188, 193 (1977))). Because the broad "receipts" definition of "proceeds" was permissible, the district court did not err in its jury instructions by failing to define "proceeds" narrowly to mean "profits."

Webster at 906 (App. 10-11)

The Ninth Circuit acknowledged that:

> We recognize that four Justices in *Santos* plurality stated that the merger problem might exist for certain payments among conspirators. *See* 128 S.Ct. at 2026-27 (Scalia, J., joined by Souter, Thomas, & Ginsburg, J.J.) (stating, "any wealth-acquiring crime with multiple participants would become

> money laundering when the initial recipient of the wealth gives his confederates their shares"). However this minority view is not controlling. Moreover, five Justices in *Santos* expressly agreed that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 2032 (Stevens, J., concurring in the judgment); *see id.* at 2035 & n.1 (Alito, J., dissenting).

Webster at 906 (App. 10)

The Ninth Circuit's decision was based solely on whether there was a merger problem, and did not discuss application of the rule of lenity to Webster's case. Creating a categorical exception for drug crimes, the court stated:

> These drug crimes do not merge with the money laundering crimes, because the drug crimes need not involve the exchange of money. See, e.g., United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir.1979) (affirming a conviction for distribution of cocaine under 21 U.S.C. § 841(a)(1) where the defendant shared the drug with others, but "apparently no commercial scheme [wa]s involved"). Because neither the conspiracy nor the drug possession count against Webster presents a merger problem, neither requires narrowly

defining "proceeds" as "profits" for the money laundering counts.

Webster at 906 (App. 9-10)

Webster timely filed a Petition for Rehearing and Rehearing *En Banc*. The Ninth Circuit denied that petition. (App. 16).

REASONS FOR GRANTING THE WRIT

I. CONFLICTING VIEWS OF THE PRECEDENTIAL VALUE OF *SANTOS* HAVE LED TO CONFLICTING INTERPRETATIONS OF THE MONEY LAUNDERING STATUTE

(A) The Court's Decision in *Santos*

Like Santos, Lamar Webster was convicted under the promotion money laundering statute which provides penalties for a person who "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the *proceeds* of specified unlawful activity," with the intent to promote the specified unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i) (2006) (emphasis added). In *Santos*, a plurality of the Court held that the statutory term "proceeds" is ambiguous and that, under the rule of lenity, the term must be interpreted in favor of a criminal defendant to mean "profits" rather than simply "receipts" – at least on the facts of that case,

which involved the receipts of an illegal gambling activity, *Santos*, 128 S.Ct. at 2025 (plurality); *Id.* at 2033-34 (Stevens, J., concurring).

The vote in *Santos* was fractured, "giving lower courts scant guidance for future applications." *United States v. Bueno*, 585 F.3d 847, 852 (5th Cir. 2009) (DeMoss, J., specially concurring.)

In *Santos*, a four-member plurality concluded that the term "proceeds" was ambiguous. 128 S.Ct. at 2023-24. Dictionaries defined "proceeds" to mean either "profits" or "receipts," *id.* at 2023, the context left the term ambiguous, and the statute was coherent under either meaning. *Id.* at 2024. Therefore, "the tie must go to the defendant" because "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* at 2024-25. The plurality accordingly found that the statutory term "proceeds" means "profits" in all cases.

Justice Stevens provided the fifth vote to affirm, agreeing that the rule of lenity applied. *Id.* at 2033. The remainder of his concurrence has confounded the appellate courts, for in his view, the Court need not "pick a single definition of 'proceeds' applicable to every unlawful activity." *Id.* Noting that applying a "gross receipts" definition of "proceeds" to *Santos'* gambling operation resulted in a longer prison sentence for money laundering than the predicate gambling offense, Justice Stevens concluded the rule of

lenity required the government to prove the laundered funds were "profits" in *Santos'* case. *Id.* at 2033-34.

(B) The Circuits Are Split As To The Effect of *Santos* in Predicate Crimes Other Than Gambling

Courts and commentators have struggled with what to make of the *Santos* decision. *United States v. Van Alstyne*, 584 F.3d 803, 812 (9th Cir. 2009) (noting "difficulty courts have encountered in turning the splintered *Santos* decisions into an intelligible rule of law"). Evan Ennis, *An Uncertain Precedent: United States v. Santos and the Possibility of a Legislative Remedy,* 95 Cornell L. Rev. 191, 218 (2009) ("In the wake of *Santos*, lower courts are now applying divergent interpretations of the case."); *United States v. Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("the precedential value of *Santos* is unclear outside of the narrow factual setting of that case, and the decision raises as many issues as it resolves for the lower court"), *cert. denied sub nom. Combs v. United States*, 129 S.Ct. 2812 (2009). As a result, the circuits that have addressed the post-*Santos* definition of "proceeds" under the applicable language of 18 U.S.C. § 1956(a)(1) have employed at least four sharply conflicting approaches that arrive at very different results.

The Third and Seventh Circuits have held that "proceeds" means "profits" in other applications of the statute. *United States v. Yusuf*, 536 F.3d 178, 185 (3d

Cir. 2008), *cert. denied*, 129 S.Ct. 2764 (2009) (Mail Fraud, holding that "proceeds" applies to all "criminal profits" derived from specified unlawful activity. *Id.* at 186 n. 12. The Seventh Circuit has also required the government to prove that laundered money was "profits" of unlawful activity beyond the gambling context. *United States v. Lee*, 558 F.3d 638, 643 (7th Cir. 2009). *See also United States v. Hodge*, 558 F.3d 630, 632-33 (7th Cir. 2009) (evidence of "rent and utilities" paid from proceeds of prostitution ring insufficient to support conviction).

The narrowest holdings are those of the Eighth and Eleventh Circuits, defining "proceeds" as "profits" only in the illegal gambling context, and employing a gross receipts definition in other contexts. *See, e.g. United States v. Demarest*, 570 F.3d 1232 (11th Cir.), *cert. denied*, 130 S.Ct. 421 (2009). (Affirming conviction based on gross receipts evidence in the drug trafficking context). As the Ninth Circuit has noted, in *Demarest*, "the Eleventh Circuit took the opposite view" from that of the Third Circuit in *Yusuf*. *Van Alstyne, supra*, 584 F.3d at 811. *See also United States v. Spencer*, 592 F.3d 866 (8th Cir. 2010). ("*Santos* does not apply in the drug context").

The Ninth Circuit, along with the Sixth, limit the "profits" interpretation only to cases where the money laundering statute presents the "merger" problem identified by Justice Stephens. *Van Alstyne*, 584 F.3d at 814; *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009) ("proceeds" mean profits when the predicate § 1956 offense creates a merger problem that leads to

a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase." *Id.* at 562). The *Webster* panel applied this interpretation, *see* discussion, *supra*.

The Fifth Circuit applies a plain-error standard to convictions under § 1956(a)(1) in the drug trafficking context, and simply holds that the "uncertainty [of *Santos*] renders any error here not 'plain,'" *United States v. Bueno,* 585 F.3d 847 (5th Cir. 2009). Thus, that court has affirmed money laundering convictions where it found sufficient evidence of "profits."

In sum, the circuits are irreconcilably divided on the interpretation of the statute for predicate offenses beyond the gambling context of *Santos*. The Court should grant the petition to restore uniformity in the administration of criminal justice.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

The undisputed holding of *Santos* is that, in a case involving illegal gambling, the rule of lenity requires that the ambiguous term "proceeds" be interpreted in defendant's favor to mean "profits." As seven Justices recognized in *Santos*, the Court's settled jurisprudence mandates that the same statutory term be interpreted consistently in all other cases, including this one, regardless of their factual context.

Id. at 2030-31 (plurality); *Id.* at 2036 (Alito, J., dissenting).

This result is dictated by the Court's decision in *Clark v. Martinez,* 543 U.S. 371 (2005). There, the statute at issue applied to three categories of aliens and provided that anyone in those categories "may be detained beyond the removal period." 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V). The court had previously determined in *Zadvydas v. Davis*, 533 U.S. 678, 697-99 (2001) that the statute's use of "may" was ambiguous and, in light of the "constitutional doubt" axiom, must be interpreted to authorize detention of aliens in the second category only as long as reasonably necessary to remove them. In *Clark*, the Court held that the *Zadvydas* interpretation must also govern the first category of aliens because the operative, but ambiguous, statutory language applied without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category "would be to invent a statute rather than interpret one." 543 U.S. at 378. The Court thus rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 386.

Thus the Ninth Circuit's opinion in *Webster*, creating a categorical exclusion for drug cases from the rule of *Santos*, conflicts with the Court's holding in *Clark*.

First, *Webster* misinterpreted *Santos*; four justices did not concur with Justice Stevens that legislative

history compels the conclusion that "Congress intended the term 'proceeds' to include gross revenue from the sale of contraband." *Id.* at 623 F.3d 906. As the *Santos* plurality notes, the legislative "history" Justice Stevens mentions is nowhere cited or memorialized:

> Justice STEVENS fails to identify the legislative history to which he refers. He offers only: "As Justice ALITO rightly argues, the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Post,* at 2035-2036. Although Justice ALITO, from one item of legislative history, draws an inference about the meaning of "proceeds" in all its applications (which we find dubious, see n. 3, *supra*), nowhere does he cite legislative history addressing the meaning of the word "proceeds" in cases specifically involving contraband or organized crime. Thus Justice STEVENS' concurrence appears to address not only a hypothetical case, see *infra,* at 2030, but even an imagined legislative history.

Santos at n.8

Significantly, seven justices rejected Justice Stevens view that the same word (proceeds) may be given different meanings in different factual contexts.

The *Santos* plurality took pains to distance themselves from that idea:

> Justice STEVENS' position is original with him; neither the United States nor any *amicus* suggested it; it has no precedent in our cases. Justice STEVENS relies on the proposition that one undefined word, repeated in different statutory provisions, can have different meanings in each provision. See *post*, at 2032, and n. 2. But that is worlds apart from giving the same word, *in the same statutory provision*, different meanings in *different factual contexts*. Not only have we never engaged in such interpretive contortion; just over three years ago, in an opinion joined by Justice STEVENS, we forcefully rejected it. *Clark v. Martinez,* 543 U.S. 371, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), held that the meaning of words in a statute cannot change with the statute's application.

Santos at 128 S.Ct. 2030 (emphasis by the Court)

The *Webster* Panel also misinterpreted the *stare decisis* effect of Justice Stevens' concurrence. The plurality makes clear it considered the reasoning applied by Justice Stevens was mere dicta:

> We think it appropriate to add a word concerning the *stare decisis* effect of Justice STEVENS' opinion. Since his vote is necessary to our judgment, and since his opinion rests upon the narrower ground, the Court's holding is limited accordingly. See *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct.

> 990, 51 L.Ed.2d 260 (1977). But the narrowness of his ground consists of finding that "proceeds" means "profits" when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist. Justice STEVENS' speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today's holding. Thus as far as this particular statute is concerned counsel remain free to argue Justice STEVENS' views (and to explain why it does not overrule *Clark v. Martinez, supra*). They should be warned, however: Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent. See *post*, at 2036, 2044.

Santos at 128 S.Ct. 2031

Webster failed to explain why its opinion did not conflict with *Clark v. Martinez*, 543 U.S. 371 (2005). Clearly, the opinion carves out a categorical exception for drug cases not intended by the plurality in *Santos*.

In this case, there was no testimony or any other evidence that the $300 wire, if received by Webster, was used to promote drug dealing. There was no testimony whatsoever about how the money was used. In fact, during oral argument, the Government acknowledged that "this is simply an expense made to keep Lamar Webster happy and it wasn't to buy

drugs or anything else," *United States v. Webster,* 2010 WL 3909293 (9th Cir.) (Oral Argument)

The reason the interpretation of *Santos* matters is because the Government used the $300 wire to prove all four counts, not just the money laundering. The Government used the alleged money laundering conspiracy to argue that Webster possessed methamphetamine on December 23, 2003, and was therefore guilty of Count II of the Indictment, possession with intent to sell on a *Pinkerton* theory. (Tr. pp. 784-85). This count resulted in a sentence of life in prison without parole.

The prosecution also argued that the money laundering conspiracy fueled transport of drugs to Montana ("the conspiracy to launder money, to move those funds, to do one purpose: to continue the flow of methamphetamine to Montana"). (Tr. p. 789, ll. 8-10). Thus, the Government argued that if Lamar Webster is guilty of one conspiracy (money laundering), he is guilty of another (conspiring to possess methamphetamine intended for sale in Billings). He was convicted on this count, and sentenced again to life without possibility of parole.

Webster, and most of the Circuit Courts, fail to discuss the rationale for *Santos* – namely, the rule of lenity. This Court, through a five-justice majority, held in *Santos* that the rule of lenity applies to the statute in issue because the statutory term "proceeds" is ambiguous. "The touchstone of the rule of lenity is statutory ambiguity" *Bifulco v. United States,* 447

U.S. 381, 387 (1980). The holding in *Santos* must govern Webster's case because the same, equally ambiguous statutory language is involved. Different facts should not allow a different interpretation of the same language. Thus, the term must be interpreted in favor of Webster in this case as well.

Now that the statutory term "proceeds" has been held ambiguous, courts are bound by it; the same interpretation must be adopted in all future cases.

In sum, the holding in *Santos* mandates that the statute be accorded the same interpretation in this case under both *Clark* and the rule of lenity. The interpretation of a criminal statute should not vary from case to case depending on the facts, nor solely on the place where a prosecution commences. This Court should grant certiorari to ensure its precedents are followed and to bring certainty to the law by resolving the conflict between circuits.

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE

Although this Court established a simple rule in *Clark* that dictates how "proceeds" under the statute should be interpreted in all factual circumstances after *Santos*, that rule has gone unheeded. The plethora of decisions, along with numerous certiorari petitions, indicates the issue is a recurring one, involving hundreds if not thousands of defendants whose cases are inconsistently impacted. In 2009, the year Webster was convicted, 812 defendants were

convicted of money laundering, and 23,938 defendants were convicted of drug trafficking offenses. U.S. Sentencing Commission, 2009 Datafile. As the Sixth Circuit has explained, the effort to define "proceeds" for the more than 250 predicate offenses to which the money laundering statute applies, will create "*Santos* litigation for years to come." *Kratt*, 579 F.3d at 563.

The amendment of the statute should not deter granting of certiorari, since "Acts of Congress are generally applied uniformly throughout the country from the date of their effectiveness onward." *United States v. Estate of Donnelly*, 397 U.S. 286, 294 (1970). Certiorari is necessary to ensure that "proceeds" is defined the same way for all defendants from the time it became effective in 1986 until Congress amended it in 2009. The Court has previously granted certiorari to resolve a conflict over statutory construction despite Congress's amendment of the statute. *Watson v. Comm'r*, 345 U.S. 544, 547 (1953).

The failure to apply *Santos* consistently reaches far beyond the money laundering statute. The failure to interpret the same statutory language the same way regardless of the facts of a particular case was the error this Court corrected in *Clark*. Ignoring *Clark* imperils the consistent interpretation of every other federal criminal statute.

The inconsistent application of *Santos* creates unevenness in the application of the rule of lenity. Where this Court has held that statutory language has a particular meaning, a lower court should not be

permitted to ascribe a different meaning because the facts of the case involve a different factual context such as drug dealing.

The result in *Webster* subverts the rule of law, and the Court should grant certiorari to bring certainty to the law.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

DATED this 4th day of March, 2011 at Bozeman, MT.

Respectfully submitted,

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APPENDIX A

623 F.3d 901

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Lamar WEBSTER, Defendant-Appellant.
No. 09-30173.

Argued and Submitted June 9, 2010.
Filed Sept. 30, 2010.

Larry Jent, Bozeman, MT, for the appellant.

Leif M. Johnson, Assistant United States Attorney, Billings, MT, for the appellee.

Appeal from the United States District Court for the District of Montana, Richard F. Cebull, Chief District Judge, Presiding. D.C. No. 1:07-cr-00128-RFC-1.

Before: CYNTHIA HOLCOMB HALL, DAVID R. THOMPSON and M. MARGARET McKEOWN, Circuit Judges.

OPINION

THOMPSON, Senior Circuit Judge:

Lamar Webster was convicted of (1) conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, (2) possession with intent to distribute over 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, (3) money laundering conspiracy, 18 U.S.C. §§ 2, 1956(h), and (4) money laundering, 18 U.S.C. § 1956(a)(1)(A)(i).

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

An investigation into methamphetamine dealing in Billings, Montana, began in December 2004. Undercover officer Mike Gilluly of the Billings Police Department developed a relationship with an informant who made several controlled buys from Richard Todd. In May 2005, Gilluly purchased three ounces of crystal methamphetamine directly from Todd, who was arrested and charged with drug crimes. Additional information led to four more arrests. The five defendants pleaded guilty and agreed to cooperate with law enforcement.

In December 2008, Lamar Webster was tried on four counts related to the methamphetamine dealing: (1) conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, (2) possession with intent to distribute over 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, (3) money laundering conspiracy, 18 U.S.C. §§ 2, 1956(h), and (4) money laundering, 18 U.S.C. § 1956(a)(1)(A)(i).

The four-day jury trial included testimony by Mike Gilluly, Richard Todd, and several of Todd's co-conspirators. The prosecution sought admission of a proposed exhibit containing the crystal methamphetamine purchased by Gilluly. The district court denied that motion. However, several wire transfers were admitted without objection.

The district court instructed the jury on the four counts. Notably, the instructions for Webster's money laundering and money laundering conspiracy counts referred to the "proceeds" of unlawful activities. For example, one element of the money laundering charge required proof "the defendant knew that the property represented the proceeds of the illegal distribution of methamphetamine." The district court did not define "proceeds." The jury returned guilty verdicts on all four counts.

On appeal, Webster challenges the admission of the testimony concerning the proposed methamphetamine exhibit, and the admission of a business record of a $300 wire transfer identifying Webster as the recipient. In addition, Webster filed a letter in this appeal pursuant to Federal Rule of Appellate Procedure 28(j) challenging the district court's failure to define "proceeds" in the jury instructions. Webster also contends we should reverse all counts for insufficiency of the evidence.

I. Testimony Concerning Proposed Methamphetamine Exhibit

At Webster's trial, the prosecution proposed Exhibit 7, which Officer Gilluly identified as including some of the crystal methamphetamine he bought from Todd, as well as two other samples generated from the original by the crime lab. The government then sought to move the samples into evidence. At sidebar, the attorneys discussed whether the sample

could be directly connected to Webster, in light of Webster's apparent withdrawal from the conspiracy by 2005. The government attorney conceded, "I'm not going to argue that it's his," and the court reserved ruling on the admissibility of the exhibit. On cross-examination, Gilluly admitted he "never met Mr. Webster."

The government also asked Richard Todd about the proposed exhibit. Todd explained he sold "crystal meth" to Gilluly, which is "the type of methamphetamine that [Todd] had received from Lamar Webster in 2003 and 2004." Todd then compared two packets in the proposed exhibit. He identified the crystal meth he sold to Gilluly and explained that it was more pure than a powdery sample.

The government then stated in open court: "Your Honor, understanding that it's not methamphetamine that is directly attributable to this defendant, for demonstrative purposes, for illustrative purposes, we move 7." The defense objected and the court sustained the objection. The testimony pertaining to the exhibit was not stricken.

Webster argues that the probative value of that testimony was substantially outweighed by the danger of its unfair prejudice, requiring exclusion under Federal Rule of Evidence 403. We disagree. The district court did not abuse its discretion by refusing to strike the testimony pertaining to the proposed exhibit. *See United States v. Tran,* 568 F.3d 1156, 1162 (9th Cir.2009) (describing the standard of

review for evidentiary rulings). The proposed exhibit was never shown to the jury and was excluded from evidence. The jury was informed that the drugs mentioned in the exhibit were not connected to Webster. The line of questioning pertaining to the exhibit was directed at educating the jury about the various forms of methamphetamine and not at making a connection between the drugs mentioned in the exhibit and Webster.

II. Wire Transfer

The record keeper of Western Union testified on behalf of the prosecution. During this testimony, the prosecution moved for the admission of two exhibits related to a wire transfer allegedly received by Webster. The district court admitted the exhibits concurrently without objection.

Exhibit 14A is Western Union's record of a $300 wire transfer sent on December 22, 2003, from "Kelly Mayes" in Billings, Montana. The money was received in Hayward, California, on December 23, 2003. The record also includes the recipient's name, "Lamar Webster," as provided by the sender. Western Union did not require the actual recipient to show identification.

Exhibit 14B is a $300 Western Union check payable to "Lamar Webster" issued on December 23, 2003, and cashed at the same Hayward store. The check also identifies Billings, Montana, as the check's

place of origin. The check is signed by "Lamar Webster" as payee.

Both Kelly Mayes and Richard Todd testified they sent the wire transfer to Webster. Richard Todd testified he sent the wire transfer to Webster on or about December 23, 2003, in response to Webster's request. Kelly Mayes, Todd's then-wife, testified that she wired Webster $300 on one occasion per Todd's request.

On appeal, Webster contends that the recipient's name, "Lamar Webster," is an out-of-court statement by the sender and is inadmissible hearsay within hearsay. He concedes, however, that the remainder of Exhibit 14A is admissible under the "business records exception" to the hearsay rule, *see* Fed.R.Evid. 803. Because Webster did not object to the admission of the exhibit into evidence, plain error review applies. *United States v. Vences,* 169 F.3d 611, 613 (9th Cir.1999).

The recipient's name is admissible under Federal Rule of Evidence 801(d)(2)(E) as an admission by a party-opponent-a co-conspirator statement made in the course and furtherance of the conspiracy. Testimony established that the senders of the wire transfer were Webster's co-conspirators and the wire transfer was relevant to the conspiracy. *See infra* Part IV. However, even if the admission of the recipient's name was error, the error was harmless in light of corroborating evidence that Webster was the recipient. In particular, Exhibit 14B, the Western Union

check payable to "Lamar Webster," involved the same amount, issued from the same place of origin, and was cashed at the same store on the same date. Furthermore, the payee's signature on that check was comparable to Webster's signature on his driver's license-an exhibit also admitted into evidence.

III. Jury Instructions for Counts (3) and (4) – Money Laundering Conspiracy and Money Laundering

In instructing the jury on the money laundering counts, the district court did not define "proceeds" as "profits," a failing which Webster now challenges for the first time. Because Webster did not raise a timely objection to the instructions, we review for plain error. *United States v. Moreland,* 622 F.3d 1147, 1165-66 (9th Cir.2010).

Webster contends our decision in *Moreland* compels the conclusion that the district court's failure to define "proceeds" as "profits" in the jury instructions constitutes plain error. *See Moreland,* 622 F.3d at 1166-67 (discussing and applying *United States v. Santos,* 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008)). We disagree.

In *United States v. Santos,* defendant Santos was convicted of gambling and money laundering crimes. 128 S.Ct. at 2023. The Court addressed the question whether "proceeds," left undefined in the definition of

money laundering in 18 U.S.C. § 1956, is defined as "profits" or "receipts" (also called "gross receipts").[1] After concluding that no definition predominated, a plurality determined the rule of lenity required the narrower "profits" definition be adopted. *Id.* at 2024 (Scalia, J., joined by Souter, Thomas, & Ginsburg, J.J., and announcing the judgment of the Court). The plurality went on to note that if the "receipts" definition were adopted instead, a "merger problem" would arise, as "nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Id.* at 2026. *Compare id.* at 2035-36 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy & Breyer, J.J.) (determining that "proceeds" "means 'the total amount brought in,' the primary dictionary definition" and relying on "what the term 'proceeds' customarily means in . . . a money laundering statute"); *id.* at 2032-33 (Stevens, J., concurring in the judgment) (considering both the "merger problem" and

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[1] One month after the district court entered judgment in this case, Congress amended 18 U.S.C. § 1956 to define "proceeds" as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9). Because the amended definition matches the applicable definition of "proceeds" in this case, we need not consider the effect of the intervening amendment.

legislative history and concluding the Court need not pick a single definition of "proceeds").

In *United States v. Van Alstyne,* we observed that "the desire to avoid a 'merger problem' united the five [J]ustices who held that Santos' payments to winners . . . did not constitute money laundering. . . . We therefore view the holding that commanded five votes in *Santos* as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos.*" 584 F.3d 803, 809, 814 (9th Cir.2009). *See also Moreland,* 622 F.3d at 1166 (determining payments of commissions in a fraudulent pyramid scheme "raise the same merger problem condemned in *Santos* and *Van Alstyne,* as commissions were central to carrying out the scheme's objective of encouraging further investment").

In addition to the money laundering crimes, Webster was charged with conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, and possession with intent to distribute over 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2. These drug crimes do not merge with the money laundering crimes, because the drug crimes need not involve the exchange of money. *See, e.g., United States v. Ramirez,* 608 F.2d 1261, 1264 (9th Cir.1979) (affirming a conviction for distribution of cocaine under 21 U.S.C. § 841(a)(1) where the defendant shared the drug with others, but "apparently no commercial scheme [wa]s involved"). Because neither the conspiracy nor the drug possession count

against Webster presents a merger problem, neither requires narrowly defining "proceeds" as "profits" for the money laundering counts.

We recognize that four Justices in the *Santos* plurality stated that the merger problem might exist for certain payments among conspirators. *See* 128 S.Ct. at 2026-27 (Scalia, J., joined by Souter, Thomas, & Ginsburg, J.J.) (stating, "any wealth-acquiring crime with multiple participants would become money laundering when the initial recipient of the wealth gives his confederates their shares"). However, this minority view is not controlling. Moreover, five Justices in *Santos* expressly agreed that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 2032 (Stevens, J., concurring in the judgment); *see id.* at 2035 & n. 1 (Alito, J., dissenting).

We, therefore, read *Santos* as holding that where, as here, a money laundering count is based on transfers among co-conspirators of money from the sale of drugs, "proceeds" includes all "receipts" from such sales. *See Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1034 (9th Cir.2009) (explaining that, when the Supreme Court issues "no majority opinion and the plurality takes a legal position more far-reaching than the position of a concurring [J]ustice or [J]ustices[,] . . . the narrowest view that commands a majority of [J]ustices is the law" (citing *Marks v. United States*, 430 U.S. 188,

193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977))). Because the broad "receipts" definition of "proceeds" was permissible, the district court did not err in its jury instructions by failing to define "proceeds" narrowly to mean "profits."

IV. Sufficiency of the Evidence

We review de novo claims of insufficiency of the evidence. *See United States v. Mincoff,* 574 F.3d 1186, 1191-92 (9th Cir.2009). Evidence is sufficient if, when viewed "'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting, with alterations, *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir.2007)).

Count (1): Conspiracy to Possess with Intent to Distribute Methamphetamine

Webster contends that his conviction under count (1) was wrongfully based on proof of a mere agreement to sell methamphetamine, in violation of *United States v. Lennick,* 18 F.3d 814, 819 n. 4 (9th Cir.1994) (holding that a sale of drugs does not establish a conspiracy; rather, "the government must show that the buyer and seller had an agreement to further distribute the drug in question"). Webster also argues the government failed to prove that he intended to commit the underlying offense.

The government points to testimonial evidence showing that Webster was aware of the drug distribution and benefitted from the distribution. Todd and Webster discussed Todd's "plan" to set up sales operations in Billings, Montana. In addition, Todd allegedly had a "little kickback relationship" with Webster. Todd explained that, as sales grew, Todd told Webster: "You know, I appreciate what you're doing for me. I'm going to go ahead, and I'm going to give you a couple hundred bucks." Also, Webster allegedly "pitched in" a free extra half-pound of methamphetamine upon Todd's promises to "double [Webster's] money."

Todd also suggested that Webster personally assisted the downstream distribution. Todd testified that Webster was present when tires were packed with methamphetamine. Webster allegedly drove with Todd from California to Billings, where they removed the spare tire from Todd's father's truck and delivered the tire to a recipient.

A reasonable trier of fact could have found Webster guilty of count (1). The testimony and the quantities of drugs sold (up to two pounds at a time) suggest that Webster was aware of the buyer's resale activities, and, thus, implicitly agreed to further distribution of the methamphetamine. Furthermore, Webster financially benefitted from that distribution. The jury was entitled to find that Webster had the required intent.

Count (2): Possession with Intent to Distribute Over 500 Grams of Methamphetamine

For count (2), the prosecution was required to prove that Webster knowingly possessed methamphetamine on or about December 22, 2003, in Billings, Montana, with intent to distribute it. The government argues that Webster is guilty under count (2) either as a co-conspirator under *Pinkerton v. United States,* 328 U.S. 640, 645-47, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), or as an aider and abetter. *See United States v. Tran,* 568 F.3d 1156, 1167 (9th Cir.2009) (explaining the legal theories that can support a conviction for possession with intent to distribute).

Webster is guilty under *Pinkerton* co-conspirator liability if Webster joined the conspiracy by about December 22, 2003, and a member or members of the conspiracy committed the alleged criminal act then or thereafter. Todd testified he began buying methamphetamine from Webster just before Thanksgiving in 2003. Todd drove the first three-ounce package to Billings, and after selling it, Todd proceeded, by Christmas, to buy and then sell four ounces, and then eight ounces, from Webster. In the last days of December, Todd bought and received a one-pound shipment from Webster.

We conclude that sufficient evidence supports Webster's conviction for count (2) based on *Pinkerton* co-conspirator liability. Todd testified to the existence of a methamphetamine distribution operation. Also,

the jury could conclude that, by December 22, 2003, Webster intended to join and did join the conspiracy. Webster's complicity is evidenced by the frequency and quantities of drugs sold by him to conspirators, the $300 wire transfer sent from conspirators to Webster on December 22, and Todd's testimony that, at the time of Todd's first purchase, he told Webster about his plan to sell methamphetamine in Billings.

Counts (3) and (4): Money Laundering Conspiracy and Money Laundering

"To support a conviction for money laundering under 18 U.S.C. § 1956(a)(1), the government must prove [Webster] (1) engaged in a financial transaction which involved proceeds from specified illegal activity, (2) knew the proceeds were from illegal activity, and (3) intended the transaction . . . to promote the illegal activity." *United States v. Marbella,* 73 F.3d 1508, 1514 (9th Cir.1996).

The two money laundering counts are based on Webster's alleged receipt of the $300 wire transfer from his co-conspirators. Webster argues there is no proof that he knew the proceeds were from illegal activity or that he intended the transaction to "promote" drug dealing, relying on testimony stating that the money was wired to Webster as a "loan."

We conclude that sufficient evidence supports Webster's money laundering convictions. A sender of the wire transfer testified that the money was "proceeds" from the drug distribution scheme, and that,

when he expressed reservations about wiring the money, Webster assured him not to worry about it. Indeed, all financial dealings between the senders of the money and Webster centered on drug sales, which were occurring regularly during this period. Thus, the jury could rationally conclude that the "loan," like the prior "kickback," was intended to promote the drug distribution scheme and that Webster knew the proceeds were from illegal activities.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, LAMAR WEBSTER, Defendant-Appellant.	No. 09-30173 D.C. No. 1:07-cr-00128-RFC-1 ORDER (Filed Dec. 6, 2010)

Before: HALL, THOMPSON and McKEOWN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellant Webster's petition for panel rehearing. Judge McKeown has also voted to deny his petition for rehearing by the court en banc, and Judges Hall and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.